SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, *ex rel.* MAY JOHNSON,

Petitioner,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

GUNTHER JACOBSON,
Counsel for Petitioner.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7 BARCLAY 7-0349

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Certiorari should be granted because of conflicting circuit court decisions on the above point; because the question of federal law involved is important and ought to be settled; because the federal question involved was decided below in a way probably in conflict with an applicable decision of this court; because the courts below departed from the usual course of judicial proceedings, which departure calls for the exercise of this court's power of supervision 8

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Certiorari is sought so that this court may determine and settle the problems arising from the impact of the Administrative Procedure Act upon the admission procedure of the Immigration and Naturalization Service. This important question of federal law ought to be settled 28

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Respondent.

PETITION FOR WRIT OF CERTIORARI

(Reference to folios)

Proceedings and Opinions Below

Petitioner prays for a writ of certiorari to review the decree hereinafter described of the United States Court of Appeals for the Second Circuit, which decree was made and entered on 29 November 1948.

Petitioner, a Swedish woman, upon arrival at New York City, was excluded from the United States by a board of special inquiry of the Immigration and Naturalization Service, which adjudicated her as mentally defective. There being no appeal from such exclusion order, petitioner sued out a writ of habeas corpus, which, after argument and re-

argument, was dismissed by Judge Simon H. Rifkind of the United States District Court for the Southern District of New York. The Judge wrote an opinion dated the 6 July 1948 (121-124).

The Court of Appeals, upon petitioner's appeal, affirmed Judge Rifkind's order by a two to one decision, dated the 29 November 1948, Honorable W. E. Clark, C. J., dissenting. None of the opinions in the courts below has as yet been reported.

This case reached the Supreme Court of the United States once before. Judge Augustus N. Hand of the Court of Appeals, Second Circuit, the same Judge that wrote the majority opinion below, denied on the 27 July 1948 petitioner's application for a stay of deportation pending the appeal herein. Thereafter Mr. Justice Stanley Reed of this court granted petitioner a stay of deportation pending the proceeding. Mr. Justice Reed's order of the 18 August 1948 is on file in the office of the Clerk of this court.

The petitioner, upon an order of Judge Rifkind, has been at large under a court bond and caused no trouble or inconvenience to anybody. She is now gainfully employed in New York City.

Jurisdiction

The order of the Court of Appeals was rendered and entered on the 29 November 1948. The jurisdiction of this court is invoked under Section 1254(1) of Title 28 U. S. C. and section 5(b) of Rule 38 of the Revised Rules of this Court, as amended.

Statement of Matter Involved

The petitioner, a woman of thirty-three years of age, a native and citizen of Sweden arrived on board the steamship Stockholm at the Port of New York on the first of March 1948 and applied for admission to the United States as a quota immigrant (23).

When seasick and exhausted, on board the Stockholm, petitioner had received the medical attention of the physician (ship's doctor) on board the Swedish ship (12). Some difficulties had ensued between the petitioner and the ship's doctor, who according to petitioner's report "disturbed her and annoyed her" (84) and "behaved in a fashion not becoming a gentleman" (94). When the ship arrived in New York, the ship's doctor turned over to the United States Public Health Service a report in the Swedish language in which petitioner's sanity was questioned (67). She was therefore examined by surgeons of the Public Health Service at Ellis Island, who issued on the 11 March 1948 a medical certificate reading (64, 65):

> "This is to certify that the above described person has this day been examined and is found afflicted with Mental Defective Class 'A'
>
> B. Pasquarelli, S. A. Surgeon
> C. W. Mangun, Surgeon."

The certificate does not show the nature of petitioner's purported affliction nor the qualification of the surgeons for the "diagnosis of insanity and mental defects," as prescribed in 8 U. S. C. 152 (p. 40 below), see record 67.

Petitioner is informed and believes that there are no two persons qualified to diagnose mental defects or diseases on Ellis Island and has alleged this in the petition for re-argument (118).

Upon relator's appeal to the board of medical officers of the Public Health Service, a short hearing was held and said board, taking into consideration the medical certificate and testimony given against it by Dr. Carlton Simon, an expert called by petitioner, affirmed the finding of the surgeons (77).

A board of special inquiry, composed of two immigrant inspectors and a stenographer, held a hearing on the 16 March 1948 and again another one on the 6 April 1948. One Inspector Mintzer participated as board member in the second hearing in lieu of one Inspector Danielson, who had sat in the first hearing (29, 44).

Petitioner in her second hearing was advised by the board of special inquiry as follows (58-59):

> "Findings of Facts:
>
> (6) that there has issued in your case medical certificate certifying you to be a 'Mental Defective, Class A' which certificate has been affirmed by a board of medical officers pursuant to your appeal to such a board.
>
> "Conclusions of Law:
>
> That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 in that you have been certified by surgeons of the U. S. Public Health Service to be mentally defective Class A."

An offer by petitioner's previous attorney (55) of further medical testimony of private psychiatrists and other medical evidence in opposition to the findings of the government surgeons was denied by the above ruling of the board. The board of special inquiry thereupon excluded the applicant from the United States (60).

Questions Presented

Thereafter, the habeas corpus proceedings described hereinabove were instituted. The questions presented were:

(a) Whether the board of special inquiry committed legal error in deeming itself bound by the certificate of the U. S. Public Health Service and in rejecting the evidence offered by the petitioner to show her sanity (104).

(b) Whether the medical report on which the board of special inquiry excluded the petitioner is defective, in that it fails to state the nature of the alien's affliction and the specific findings of the government surgeons, and in that it fails to state that the government surgeons were qualified to act under 8 U. S. C. 152, and in that the findings of the surgeons and the board of medical officers were based on insufficient evidence, to wit, the hearsay report of the Swedish ship's doctor (114, 115), which the latter had revoked (13).

(c) Whether the boards of special inquiry acting herein had jurisdiction in view of the fact that they were neither composed nor acting in accordance with the rules of the Administrative Procedure Act (111, 113).

Judge Rifkind in his opinion of 6 July 1948 (122 to 133) dismissed the writ, without receiving evidence, on the grounds: That the board of special inquiry acted within the law in ruling in reliance upon the certificate of the government surgeons and without making an independent finding that petitioner was mentally defective (126); that the Administrative Procedure Act does not affect the composition of Board of Special Inquiry; that there are no defects visible on the face of the medical certificate.

The opinion of the majority of the judges in the Court of Appeals affirmed Judge Rifkind's order, Judge Clark dissenting, as aforesaid, on the ground that the medical certificate was insufficient.

Reasons Why Certiorari Should be Granted

These reasons are set forth in the brief in the caption of each point and at the end of each point. To avoid repetition, reference is respectfully made to the brief annexed hereto.

Wherefore, it is respectfully prayed that a writ of certiorari issue to the U. S. Court of Appeals for the Second Circuit.

New York City, 6 January 1949.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a petition for a writ containing the prescribed statements of facts concerning the proceedings below and the merits of the case, and the conclusions of law why the writ should be granted.

This brief sets forth the legal argument, point by point, quoting and citing authority where necessary, and mentioning additional facts appearing on the record where advantageous for continuous reasoning.

A complete compendium of all statutes and regulations cited is appended to the brief. The assignment of errors appears from the captions of the following points:

POINT I

It was error on the part of the board of special inquiry and the courts below to deem the board of special inquiry bound by the certificate of the U. S. Public Health Service and to reject the evidence offered by the petitioner to show her sanity.

Certiorari should be granted because of conflicting circuit court decisions on the above point; because the question of federal law involved is important and ought to be settled; because the federal question involved was decided below in a way probably in conflict with an applicable decision of this court; because the courts below departed from the usual course of judicial proceedings, which departure calls for the exercise of this court's power of supervision.

The board of special inquiry herein proceeded on the theory that it was legally unable to make its own findings of the mental condition of the relator. It refused to hear testimony of relator's physicians that she was mentally healthy and sane (54-59).

The minutes of the hearing before the board of special inquiry show that on 16 March 1948 the presiding inspector, at the end of the hearing, advised the relator as follows:

> "You are advised that the certification entered in your case renders you mandatorily excludable so far as this board is concerned, from which exclusion there is no appeal."

At the following hearing towards the end, the board made the following conclusion of law:

> "That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1947, as you have been certified by surgeons of the United States Public Health Service to be mentally defective, Class A."

Judge Rifkind in his opinion (126) stated with respect to this phase of the case:

> "I agree that the Board acted in reliance upon the certificate but I hold that in so doing it acted within the law."

The same conclusion was reached by the Court of Appeals, Second Circuit. It is submitted that the judges below and the members of the board of special inquiry are in error.

Sentence 4 of Section 153, Title 8, U. S. C. A., setting forth the powers of the boards of special inquiry, reads:

> "Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported."

The statute clearly vests the power to determine the admissibility of an alien in the boards and in no other agency. In the present case the board refused to determine but found as a matter of law that it was bound by the medical certificate!

The powers of the medical examiners are set forth in section 152, Title 8, U. S. C. A., which holds in sentence 1:

> "The physical and mental examination of all arriving aliens shall be made by medical officers of

> the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *."

It is here clearly shown that the certification of the medical officers is "for the information of * * * the boards of special inquiry", and it is respectfully submitted that, were it otherwise, the statute would be void and in violation of the due process clause of the Fifth Amendment of the Constitution of the United States. The boards of special inquiry are the fact finding tribunals, the medical officers are experts whose opinion can be challenged and overcome by contrary evidence.

The opinion here expounded has been the prevailing opinion in the United States Circuit Courts and, it may be inferred, is the opinion of the Supreme Court of the United States.

The leading cases in the First Circuit are:

Ex parte Joyce, 1913, D. C. Mass., 212 F. 282.

This was a petition for a writ of habeas corpus on behalf of Nora Joyce, an alien immigrant excluded from the United States on the ground of feeble-mindedness. It was held in said case by Morton, D. J.:

> "The tribunal by which the right of an alien to enter is to be determined is the board of special inquiry. As I understand the act, the medical board

is not an appellate tribunal to correct the errors of the medical inspector; its members are merely called upon to furnish information to the board of special inquiry which is to decide the case, their opinion, as contained in their required certificate, or as given orally at the hearing, is evidence to be considered by the board of special inquiry. The board of special inquiry is not bound by the opinion of the medical board, and ought, in reaching a decision, to consider all evidence which is brought to its attention.

"(287) * * * it seems to me that the board of special inquiry made an error of law in assuming that it was bound to act in accordance with the medical certificate. There can be no doubt that the error of law was fundamental. It led the immigration authorities to refuse the alien's request for an opportunity to obtain evidence in her behalf, and to refrain from making any independent decision of the case * * *

"After the writ has been issued and served and Joyce is in the custody of this court for a re-hearing of the case, in accordance with the decision in Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, she may be admitted to bail in the sum of $500, and the case itself may go on the list for September 8th for a hearing on the merits. At that time I will hear and determine the question whether she is entitled to admission."

Ex parte Joyce is a District Court opinion which received sanction by approval of the First Circuit Court in *Billings* v. *Sitner*, 1915, 228 F. 315, where it was held by Dodge, J. (316):

"It appears from the facts agreed by the parties that the board so voted (to exclude Sitner on the ground of feeblemindedness) because it assumed that

a certificate by the medical officer who had examined him under section 17 of the act, to the effect that he was feebleminded and his vision was defective, of itself bound the board to exclude, notwithstanding any other evidence.

"We agree with the District Court that this assumption was erroneous, and prevented the hearing from being the fair hearing required by law. Section 10 of the act provides that the board's decision 'based upon the certificate of the examining medical officer' shall be final as to the rejection of aliens affected with mental or physical disability which would bring them within the excluded classes. But this cannot mean that the certificate is to take the place of a fair hearing by the board. Such construction would result in giving the inspecting medical officer instead of the board the final decision. Although immigration rule 17, subdivision 4, 5 (note), state that the board is 'virtually compelled' to base its decision upon the certificate, we hold that it has no right to do so without exercising its own judgment, after considering not only the certificate, but whatever other evidence there may be touching the alien's right to enter."

The judges below dismissed these cases as precedents on the ground that they were holdings under the act of 1907 which slightly deviates in language from the present act of 1917 (128).

For the purpose of convenience both sections are herewith set forth in tabular form:

Section 17 of the Immigration Act of 1917 (8 U. S. C. 153).	Section 10 of the Act of 1907.
That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act.	That the decision of the board of special inquiry based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act.

It is respectfully submitted that this change in language from the act of 1907 to that of 1917 is no change in substance. All Congress intended to do was to provide that the board of special inquiry could only decide that an alien was excluded on the ground of insanity if there was a certificate of the medical officers to that effect. In the absence of such certificate the board may not exclude the alien on other evidence; but in the presence of such certificate the board still has to make a "decision", that is to admit other evidence, weigh the evidence, and possibly overrule the certificate in favor of the alien.

This is quite clear in view of the language of section 152, previously adverted to herein, that the certification of

the medical examiners is merely for "the information of the * * * boards of special inquiry". It is submitted that the judges below came to an erroneous conclusion of law because they did not give sufficient weight to the language of section 152 when attempting to construe section 153.

It is contended on the part of petitioner that the "finality" of the decision of the board of special inquiry merely means that there is no appeal to the Board of Immigration Appeals, but that it does not prevent the boards of special inquiry from functioning in a judicial capacity.

That this construction of the exclusion statutes is still applied in the First Circuit is apparent from the case of *Liang Buck Chew*, D. Mass. 1923, 296 Fed. 182, which came up under the 1917 Act and adhered to *Ex parte Joyce* and to *Billings* v. *Sitner, supra.*

The language of *Ex parte Liang Buck Chew*, 296 F. 182-183 is clear and convincing. It was there held by Morton, J.:

> "Chew, after having resided several years in this country, went back to China for a visit. On his return when he was examined by the health officials of the Immigration Service he was found to be afflicted with clonorchiasis or fluke worm of the liver. The Health Officers thereupon certified that the applicant was suffering from a 'dangerous contagious disease.' The board of special inquiry, considering that it was bound by this certificate, made an order on that ground alone excluding the applicant. He was held for deportation under this order when the present proceeding was instituted.
>
> "(1) The government contends in the first place that the medical certificate is conclusive upon all

parties in interest, and that no inquiry is open as to whether it was correct or incorrect, reasonable or unreasonable. The provisions of the statute (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§4289-1/4a-4289-1/4u) on this point are as follows: Section 3 (section 4289¼b) excludes aliens 'afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease.' Section 16 (section 4289-1/4i) provides for the physical examination of arriving aliens by medical officers of the Public Health Service, who are required to have had certain professional qualifications, and who 'shall certify, for the *information* (italics mine) of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien.' Section 17 (section 4289-1/4ii), dealing with hearings before boards of special inquiry provides 'that the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease.' Section 21 (section 4289-1/4kk) is not applicable to the present proceedings.

"It is going a long way to say that the action of the medical officer is absolutely final, however capricious, unfounded, and unreasonable it may be. If that had been the intention of the act, it would, I think, have been stated in explicit terms, but there is no such language. The status of the certificate appears to be established by section 16; it is made 'for the *information* of the immigration officers and the boards of special inquiry.' The proviso of section 17 appears to mean that rejection because of

> disease shall not be made by a board of special inquiry unless such disease is certified by a health officer, and to be in the nature of a limitation on the powers of the boards of special inquiry. It therefore seems to me that the certificates of a health officer made under this act stand on the same footing as final decisions of other immigration tribunals, and that it is open to the petitioner to show that the certificate was wholly unwarranted upon any reasonable view of the applicant's condition; in other words, was unsupported by any evidence. The testimony in regard to the condition of the applicant and the nature of clonarchiasis, which was received at the hearing subject to be ruled upon later, is therefore admitted."

There can be no doubt that the construction of the statute here proposed has the approval of the Court of Appeals for the First Circuit.

The rule here proposed, which is contrary to that of the court below, is that prevailing in the Ninth Circuit.

In *Gee Shew Hong* v. *Nagle*, 1927, 18 F. (2d) 248, the Ninth Circuit Court of Appeals, considered the case of another Chinese who was afflicted with clonarchiasis and the alien was excluded on the ground that this disease was deemed loathsome and contagious. The question whether the certificate of the medical examiners under the act of 1917 was binding and final came up and was decided by the Court of Appeals in the following holding:

> "We cannot agree that the medical certificate has any such finality or conclusiveness as is claimed for it. The power to admit and exclude aliens is vested in a board of special inquiry, subject to the right

> to appeal, not in the medical officers of the Public Health Service. The certificate is furnished 'for the information of the immigration officers and the board of special inquiry' and is evidence and nothing more. True, an exclusion decision is not final unless based on the certificate of the medical officers, but the certificate itself may be challenged, at least by the alien."

The rule proposed here, seems to have been adopted by the Supreme Court of the United States. This seems to follow from the case of *U. S. ex rel. Fink v. Tod*, 1924, C. C. A. 2nd, 1 F. (2d) 246, certiorari granted in 266 U. S. 599, 45 S. Ct. 125, reversed on confession of error on the part of Solicitor General Beck in 267 U. S. 571, 45 S. Ct. 227.

In this case the alien was excluded on the ground of feeble-mindedness, certified by the medical examiners. The Court of Appeals, Second Circuit, thoroughly discussed in its decision the above-mentioned decisions from the First Circuit (*Billings* v. *Sitner and Ex parte Joyce*) and came to the conclusion:

> "Notwithstanding the respect we entertain for the courts that rendered the decisions referred to, we simply are unable to accept the conclusions at which they arrived."

Discussing the binding force of the medical certificate the court held (253):

> "The statute declares that the board of special inquiry shall base their decision upon the medical certificate. We can only interpret this to mean that the medical certificate is conclusive as to the physical

> and mental condition of the alien examined. And we do not think it was intended that the board of special inquiry constituted by non-medical men should have the right to sit in review upon decisions of medical questions rendered by a board of medical officers or by a medical inspector. If such was not the intention, why require that the decision of the board of special inquiry 'shall be based upon the certificate of the examining medical officer'?"

On page 255 the court sums up its legal conclusions by stating:

> "The duty mandatorily impressed by the statute was to exclude her."

The rule laid down in this case by the U. S. Court of Appeals for the Second Circuit is on its face and explicitly contrary to that of the Court of Appeals for the First Circuit. There being a head-on collision of the two Circuit Courts of Appeal, the Supreme Court, as stated before, granted certiorari (266 U. S. 399, 45 S. Ct. 125). The Supreme Court then reversed the judgment of the Court of Appeals for the Second Circuit in 267 U. S. 571, 45 S. Ct. 227. This is a memorandum decision reading:

> "Judgment reversed with costs; and cause remanded to the District Court of the United States of the Southern District of New York with directions to discharge the petitioner, upon confession of error by Mr. Solicitor General Beck."

It follows from this reversal that the opinion of the Second Circuit Court in *U. S. ex rel. Fink* v. *Tod*, which is exactly congruent with the decision here appealed from was overruled in the Supreme Court and is not the law.

In order to find out more definitely on what ground the Solicitor General confessed error in the above case, the undersigned made inquiry with the present Solicitor General. Mr. Solicitor General Philip B. Perlman by letter of 20 July 1948, making answer to said inquiry, stated:

> "I have your letter of July 19th and I regret that I am unable to advise you as to the grounds upon which the Solicitor General confessed error in the case of U. S. ex rel. Fink v. Tod, 267 U. S. 571.
>
> "I have examined the brief filed by the Solicitor General James M. Beck in that case and there is no indication in it of a confession of error. The files of the case are not readily available and I am unable to inform you what happened subsequent to the filing of the brief."

It is the belief of the undersigned that the confession of error must have been prompted by the conviction of the late Solicitor General Beck that the opinion of the Circuit Court of Appeals that the boards of special inquiry were bound to the medical certificate was not the law and untenable.

The decision of *U. S. ex rel. Fink* v. *Tod* is expressly cited by the Ninth Circuit Court in *Gee Shew Hong* v. *Nagle* and overruled.

On the basis of these decisions it is maintained that the rule of law here proposed was set forth by the Court of Appeals for the First and Ninth Circuits and, in overruling the Second Circuit Court, by the Supreme Court of the United States.

In view of the foregoing decisions of the Supreme Court and the various Circuit Courts, it seemed unprofitable to

discuss the decision of Judge Patterson in *U. S. ex rel. Frumcair* v. *Reimer*, S. D. N. Y., 1938, 25 F. Supp. 552, upon which the court below so heavily relies. It is submitted that Judge Patterson's opinion is not in line with commanding authority. Besides, Judge Patterson's decision can be basically distinguished on the facts from the present case. In *U. S. ex rel. Frumcair* v. *Reimer* there was no dispute of the fact that the alien seeking admission suffered from ringworm of the toe nails. The alien argued that ringworm of the toe nails was neither loathsome nor dangerous. This case therefore is no authority for the question whether a board of special inquiry is bound to follow the certification of the medical examiners where, as in the present case, the fact is in issue whether or not an alien is afflicted with the disease or infirmity appearing in the certification.

The Court of Appeals sought enlightenment concerning the true construction of section 17 of the Immigration Act of 1917 (8 U. S. C. 153) by examining the Senate Committee report number 352, 64th Congress, 1st Session, which contains the following language with reference to section 17 of the Immigration Act of 1917:

> "But said provision has been slightly changed so as to clarify its meaning and meet recent Court decisions tending to modify the principle, upon which provisions of this kind in the Immigration Law have heretofore been based, that on medical questions the opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the Immigration officials, but questions of a purely medical nature must be determined by members of the medical profession."

It is respectfully submitted that this language in no way precludes the construction of the law here proposed.

The petitioner does not maintain that the board of special inquiry may arbitrarily overrule the doctors. If the members of the board form an opinion as to the alien's mental condition, it must be based upon medical evidence. To use the language of the above report: "on medical questions the opinions of doctors as against that of laymen should prevail." But where doctors have conflicting opinions, as in the present case (Dr. Simon having testified as to the alien's health of mind), and where further medical testimony was offered, such contrary evidence should have been weighed, or the case remanded to the Public Health Service, as in *Gee Shew Hong* v. *Nagle*, 18 F. (2) 248. Instead of doing this, the board of special inquiry abdicated entirely, and declared itself absolutely bound to the doctors' certificate.

The opinion of the Court of Appeals herein derives from the language of the Senate Committee Report of the conclusion that the new version of section 17 of the Immigration Act of 1917 was destined by Congress to overrule *Billings* v. *Silner*, 228 Fed. 315, quoted above. The opinion holds that the words of Section 17 "that the decision of a Board of Special Inquiry shall be based upon the certificate of the examining medical officer" indicates that the Board *must* adopt the findings of the certificate.

It is respectfully suggested that there is no force in this argument, for the statute expressly holds that the certificate is for the *information* of the board of special inquiry (8 U. S. C. 152). If petitioner's evidence had been admit-

ted and the board should have sustained the experts of petitioner rather than those of the government, "the opinions of doctors" would have prevailed and the language of the Senate Committee report would have fully been satisfied. Indeed there is no appreciable difference in meaning between section 17 of the Act of 1917 and section 10 of the Act of 1917. That both are identical in meaning was the opinion of the Court of Appeals, Second Circuit, as expressed in *U. S. ex rel. Fink* v. *Tod*, 1 F. 2d 246, where the court, discussing the two Massachusetts cases previously pointed out (*Billings* v. *Sitner* and *Ex parte Joyce*) held (255):

> "The above decisions were not rendered under the Act of 1917, but under the Act of 1907. But we fail to find anything in the two acts which enables us to say that they afford any justification for saying that any sound reason exists for distinguishing those cases in principle from the one now before this court."

The Court of Appeals of the Second Circuit so held in 1924 after examining and discussing the same language of the Senate Committee report which now prompts the court to draw a distinction of the Acts of 1907 and of 1917.

The conclusion is justified that there is no difference in meaning between the Acts of 1910 and 1917, and that the Massachusetts cases hereinabove quoted are authority for the proposition here submitted, and that the distinction between the Act of 1907 and that of 1917 made by the Court of Appeals, Second Circuit, in the present decision is contrary to its own previous holding and therefore of doubtful soundness.

The conclusion reached therefore is, that the board of special inquiry in the present case committed legal error in overruling petitioner's offer to prove her mental competence and in deeming itself bound by the medical certificate.

Inasmuch as this case presents a clear conflict of decisions of several circuit courts, as furthermore this court itself recognized this conflict when it granted certiorari in *U. S. ex rel. Fink* v. *Tod*, 266 U. S. 399, 45 S. Ct. 125, it is respectfully suggested that the question whether boards of special inquiry are bound by medical certificates should be finally determined by this court. The granting of certiorari seems proper on all the grounds of Rule 35 of this court;—*i.e.* there are conflicting decisions of circuit courts; an important question of federal law is presented which has not been, but should be settled by this court; a federal question has been determined by the court below in a way probably in conflict with the decision of this court in *Fink* v. *Tod*, 267 U. S. 571, 45 S. Ct. 227; the board of special inquiry and the courts below have departed from the accepted and usual course of judicial proceedings to such extent as to call for this court's power of supervision.

POINT II

It was error on the part of the board of special inquiry and of the courts below to use as basis for petitioner's exclusion a medical report so vague, indefinite, and perfunctory, that it did not show the nature of petitioner's purported affliction nor the qualifications of the examining physicians, that it was based exclusively upon the insufficient evidence of the hearsay report of the Swedish ship's doctor.

Certiorari should be granted because of conflicting circuit court decisions on the above point and because the question of federal law involved is important and ought to be settled.

Judge Clark in his dissenting opinion herein proposed to sustain the writ

> "because of inadequacy of the original certificate of the examining surgeons and total failure of the reviewing board of medical officers to comply with regulations."

Judge Clark has so forcefully stated petitioner's case in his dissenting opinion that petitioner feels unable to add to it, but respectfully incorporates this dissenting opinion into this brief by reference. The court is particularly adverted to the following decisions cited and quoted in Judge Clark's dissenting opinion:

Hughes v. *U. S. ex rel. Licata*, C. C. A. 3, 295 F. 800;

U. S. ex rel. Powlowee v. *Day*, 1930, C. C. A. 2, 33 F. (2d) 267; cert. den. 280 U. S., 594;

U. S. ex rel. Papa v. *Day*, 1930, S. D. N. Y., 45 F. (2d) 435;

U. S. ex rel. Devenato v. *Curran*, C. C. A. 2, 299 F. 206;

U. S. ex rel. Fong On v. *Day*, 1932, C. C. A. 2, 54 F. (2d) 990.

The court below, in overruling Judge Clark, in effect held that so perfunctory a medical certificate as the one here presented is sufficient to exclude an alien. If such rule is to prevail, complete arbitrariness of the government surgeons will ensconce itself, where under our system of law and the due process clauses of the Constitution a more accurate and thorough procedure ought to be applied.

Again, we have conflicting decisions of the various Circuit Courts.

In *Wong Bing Pon* v. *Carr*, 1930, 41 F. 2d 604, the Circuit Court of Appeals for the Ninth Circuit held:

> "Two public health surgeons signed a certificate stating it to be their opinion that he is 9 years of age, the certificate containing, however, no statement as to specific physical findings upon which they base their conclusion. Appellee concedes that the opinion expressed by such certificate is of no greater value than the expression of an opinion by a layman."

While the Court of Appeals for the Ninth Circuit held that "so stark and unadorned a medical certificate"* as the one here discussed, which fails to state the "specific physi-

* Language of Clark, J., dissenting opinion.

cal findings upon which they (the government surgeons) base their conclusion * * * is of no greater value than the expression of an opinion by a layman", the court below holds that it is an opinion of doctors that should prevail as against that of laymen (p. 185, opinion below).

A further defect of the medical certificate is that it does not show the qualifications of the examining surgeons. 8 U. S. C. 152, third sentence, expressly ordains

> "Medical officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty * * * at all points of entry. * * * "

The certificate does not show that this provision has been complied with. Moreover, petitioner expressly alleged on information and belief that the medical examiners were not qualified under the said statute (118). Even if the court shall hold that the certificate need not show the qualifications of the government surgeons on its face, proof of this material allegation should have been taken in the district court. This allegation was not invented out of thin air, for the undersigned has information that the absence of alienists from Ellis Island was a matter of inquiry before the House Subcommittee on Immigration in 1947-1948 where one Abe Orlow testified in conformity with this allegation.

This point must be emphasized, for the entirely erroneous results of the examination by the government physicians, who possibly were not prompted by improper motives, can only be explained by their unfamiliarity with the diagnosis

of mental defects, which unfamiliarity makes their findings no better than those of laymen (see Senate Committee Report, *supra* p. 20).

If we furthermore consider that these findings were based on the hearsay report of the Swedish Ship's Doctor who in turn had no experience in psychiatry and who "volunteered the opinion that the alien is not suffering from mental disorder." (13), we have the key to the total miscarriage of justice in the present case: It results from an accumulation of violations of all procedural safeguards provided by law.

It is suggested that certiorari should be granted because of conflicting decisions of the two circuit courts (the ninth and second), because of the importance of settling the questions of what a medical certificate pursuant to 8 U. S. C. 152 must contain and whether the statutory qualifications of the government surgeons can be enforced or are doomed to become a sanctimonious falsehood.

POINT III

It was legal error of the court below not to reverse the decision of the District Court in that the procedure before the board of special inquiry and the composition of the board were contrary to the Administrative Procedure Act and in that said board's decisions therefore were without due process of law, void and of no effect.

Certiorari is sought so that this court may determine and settle the problems arising from the impact of the Administrative Procedure Act upon the admission procedure of the Immigration and Naturalization Service. This important question of federal law ought to be settled.

It is well settled that the Administrative Procedure Act of 1946 is applicable to Immigration procedure:

U. S. ex rel. Lindenau v. *Watkins*, 1947, S. D. N. Y., 73 F. Supp. 216;

U. S. ex rel. Trinler v. *Carusi*, 1948, C. C. A. 3, 166 F. (2d) 457;

Eisler v. *Clark*, 1948, D. C. D. C., 77 F. Supp. 610.

The following infractions of said act are invoked:

A. The members of the Board were not qualified under section 11;

B. The Board, at the hearings of 16 March and 6 April 1948, was composed of different members.

A.

In *Eisler* v. *Clark*, 77 F. Supp. 610, Judge Goldsborough enjoined the Attorney General from proceeding against Eisler by giving him deportation hearings before immigrant

inspectors and held that the person holding such hearing must be a qualified examiner under the Administrative Procedure Act, Section 11. This case is defectively reported in 77 F. Supp. 610 and petitioner submits to this Court, annexed hereto as Appendix II; the order entered in the *Eisler* case, which will more completely reveal the import of this decision.

The question to be determined in this case is whether the requirements of the Administrative Procedure Act, sections 5 and 11, apply equally to admission proceedings, for the *Eisler* case was a deportation case while the present one is an exclusion case.

The courts below held that boards of special inquiry are exempt from the provisions of section 11 by the saving clause of section 7a, exempting "conduct of special classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." As boards of special inquiry were instituted by Section 153, Title 8, U. S. C. A., the question is whether this section supersedes section 11 of the Act.

For the construction of Section 7a reference is respectfully made to the proceedings in the Senate of the United States of 12 March and 17 May 1946 where Senator McCarran, as reported in "Administrative Procedure Act, Legislative History, Senate Document No. 248, 79th Congress, Second Session," stated on the floor of the Senate as follows (p. 325):

> "The committee has considered the possibility that the preservation in section 7(a) of the 'conduct of specified classes of proceedings in whole or part by

or before boards or other officers specially provided for by or designated pursuant to statute' might prove to be a loophole for avoidance of the examiner system. If experience should prove this true in any real sense, corrective legislation would be or might be necessary. Therefore, the committee desires that Government agencies should be put on notice that the provision in question is not intended to permit agencies to avoid the use of examiners, but only to preserve special statutory types of hearing officers *who contribute something more than examiners could contribute*, and at the same time to assure the parties fair and impartial procedure."

Congressman Walter on page 364 of the same Senate Document, stated:

"The section 7 exemption 'does not mean, that agencies are authorized—whether pursuant to the express authority of other statutes or not to avoid the examiner system—set up in this bill * * * by assigning general employees or attorneys to hear cases individually or as boards.

"In short, unless the agency or its members or some specially qualified statutory officer hears the case, an examiner qualified under section 11 of this bill must do so:' "

(See also p. 268 ibid.)

The Attorney General's Manual on the Administrative Procedure Act, pp. 71-72 holds:

"A statutory provision which merely provides for the conduct of hearings *by any officers or employees the agency may designate*, does not come within the

exception so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11."

It is respectfully pointed out therefore to this court that Section 7a of the act does not intend that agencies use it as a "loophole for avoidance of the examiner system."

Section 153 of Title 8, U. S. C. A. now holds in sentence 2:

"Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards."

The designation of the Commissioner is contained in section 60.29 Code of Federal Regulations, reading:

"Sec. 60.29 Persons qualified as members of boards of special inquiry; oath. In accordance with the provisions of section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

"(a) Immigrant inspectors, including persons designated immigrant inspectors by Sec. 60.27;

"(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

"(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I-266 before an immigrant inspector."

It is further provided in said Code of Federal Regulations, Section 130.1:

"Sec. 130.1 Organization. Each of the three members of a board of special inquiry prescribed by section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153) shall be a person qualified for such membership as provided by Sec. 60.29 of this chapter. The officer in charge shall designate one of the members as chairman. One of the members may act as secretary for the purpose of keeping the complete permanent record of the proceedings before the board and of all such testimony as may be produced before it."

It is respectfully submitted that this entire procedure is contrary to the Administrative Procedure Act in that:

(a) The separation of functions as provided in section 5c of the Act is not applied;

(b) The assignment by supervisory officers of secretaries to act as members of the Board, is particularly contrary to the spirit of sections 11 and 7a.

In the present case, as the record shows (28, 44) secretary Fairbanks acted as board stenographer and member of the board.

It is submitted that while the Commissioner of Immigration under section 153, Title 8, U. S. C. has the power to designate the members of the Boards of Special Inquiry, he must designate for such purpose persons qualifying under section 11 of the Act, and that a stenographer, assigned by the "supervisory officer" can under no circumstances be considered a proper member of a board exercising very important judicial functions. Was such stenographer, temporarily employed and uninstructed in immigration matters, to use the language of Senator McCarran and of Representative Walter, *supra*, pp. 29, 30, to "contribute something more than examiners could contribute"; is she a "specially qualified statutory officer"?

B.

The procedure before the Board was furthermore defective in that it did not meet the requirements of Section 5(c) of the Act, which reads:

> "(c) *Separations of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision* required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; *nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency.* No officer, employee, or agent engaged in the performance of investigative or prosecuting functions

for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

This section has not been complied with in at least two points: (1) there were two hearings before the board of special inquiry, one on 16 March, the other on 6 April. The board on 16 March was composed of inspectors Clark and Danielson, and of Miss Fairbanks, the stenographer (28). On 6 April 1948 it was composed of inspectors Clark and Mintzer, and of Miss Fairbanks (44). Inspector Danielson, in other words, was replaced by inspector Mintzer in the second hearing. This is contrary to the Act which prescribes that the *same* officers who preside at the reception of evidence shall make the decision. The record shows that Exhibits 1 and 2 were received in evidence during the first hearing (37-38) and inspector Mintzer who participated in the decision was not then present. There is nothing in the record to show that inspector Danielson became "unavailable to the agency". For this reason the decision rendered on 6 April 1948 is void, of no effect, and contrary to statute.

The Administrative Procedure Act, as shown above, changed the existing law with respect to the point here raised by introducing higher standards of fairness for ad-

ministrative hearings than had theretofore prevailed. Section 5(c) has changed the rule previously prevailing, which was laid down in *U. S. ex rel. Chin Cheung Nai* v. *Corsi*, 55 F. (2d) 360, aff'g 64 F. (2d) 1022.

It is respectfully submitted that a very important question of federal law is presented here which should be determined by this court as early as possible. The Administrative Procedure Act of 1946 has deeply affected all federal agencies. Many of them had or will have to make far reaching changes in procedure, organization and approach to the public to comply with the mandates of the statute. It is only human that this process of adaptation to new rules will be retarded and even partly frustrated by old habits and patterns of thought that the average officer will cling to, unless enlightened by this Court as to the new requirements of the statute.

Among the agencies the Immigration and Naturalization Service is of far reaching importance, reaching deep into the lives of the millions of aliens living in this country and of millions entering the United States for pleasure, business and in transit. The fairness of the procedure administered to these aliens will contribute to the respect with which the world at large will consider the United States of America. The sooner this Court will determine to what extent admission proceedings are subject to Articles 5, 7 and 11 of the Administrative Procedure Act, the sooner the twilight will be removed that must taint all acts and decisions of the boards of special inquiry until this Court will have determined the questions hereinbefore raised.

The government will not deny that the members of the board of special inquiry who sat in the instant case do not qualify under sections 11 and 5 of the Administrative Procedure Act, in that they have not been designated, appointed or qualified in accordance with the requirements of the Act; that they are responsible to and subject to the supervision and direction of their superiors in the Service, their officers, employees and agents who are engaged in the performance of the investigating and prosecuting functions of the Service, and that the other safeguards of the Act to assure the conduct of the hearings in an independent and impartial manner have not been observed.

It is prayed that this Court grant certiorari to determine the impact of the Administrative Procedure Act upon the admission procedure of the Immigration and Naturalization Service.

CONCLUSION

The technical points herein discussed may tend to becloud the human side of the present case. There is a young woman, a member of a friendly and respected nation, who embarked for the United States in a strictly legal manner. Her passport and visa were regularly obtained; she arrived here expecting no trouble, in conformity with law.

From 1 March to 1 October 1948 she has been held at Ellis Island. Her behavior for seven months was exemplary and that of a sane and normal person (55). This has never been contested. She has been at large for three months and again conducted herself properly.

The record is devoid of any evidence that petitioner is not in best mental health, except a medical certificate that is ambiguous, uncertain and obscure, and obviously based on hearsay evidence which was caused by malice and revoked by its author.

That medical certificates of the U. S. Public Health Service are not infallible is shown by the case, quoted above, of *U. S. ex rel. Fink* v. *Tod.* In that decision, as the record on appeal reveals, there were six examinations held. In the first four examinations held at Ellis Island the alien was certified as feeble-minded. In the fifth examination, held in Washington, before surgeons of the Surgeon General's staff, the alien was pronounced sane and not feeble-minded. In the sixth examination the surgeons were divided, the Ellis Island surgeons voting for feeble-mindedness, the Washington surgeons for sanity.

If this alien will have a fair hearing before unbiased examiners and qualified surgeons and if she will be enabled to show her mental health by appropriate medical testimony, she will properly qualify for admission.

The petitioner therefore respectfully approaches the Supreme Court of the United States craving justice and praying that this court review her case and grant this petition for certiorari.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner

APPENDIX I

1. Immigration Act of February 26, 1907, c. 1134, Section 10; 34 Stat. 901.

"That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act."

2. United States Code Annotated, Title 8.

"Section 136. Aliens excluded.

The following classes of aliens shall be excluded from admission into the United States:

Idiots, imbeciles, etc.

(a) All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism.

* * *

(c) Persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease.

* * *

Mental or physical defectives

(d) Persons not comprehended within any of the classes enumerated in paragraphs a, b, or c, *who are found to be and are certified by the examining surgeon as being mentally* or physically *defective*, such

physical defect being of a nature which may affect the ability of such alien to earn a living.".

"~~Section 132~~ Physical and mental examination of alien passengers; regulations (numbers of sentences supplied).

"(1) The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service *who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry* hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such aliens; or, should medical officers of the United States Public Health Service be not available, civil surgeons of not less than four years' professional experience may be employed in such emergency for such service upon such terms as may be prescribed by the Commissioner of Immigration and Naturalization, under the direction or with the approval of the Attorney General. (2) All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Attorney General, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. (3) *Medical officers of the United States Public Health Service who have had especial training in the diagnosis of insanity and mental defects shall be detailed* for duty or employed at all ports of entry designated by the Attorney General, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens in whom insanity

or mental defect is suspected, and the services of interpreters shall be provided for such examination. (4) Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense.

"Section 153. Boards of Special Inquiry; appointment. (Sentences 4 and 8.)

"(4) Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported.

"(8) The *decision of a board of special inquiry shall be based upon the certificate* of the examining medical officer and * * * shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous conatgious disease, or with any mental or physical disability *which would bring such aliens within any of the classes* excluded from admission to the United States under section 136 of this title."

Administrative Procedure Act of 1946.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other

than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(c) SEPARATIONS OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Appendix I

Hearings

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make

decisions or recommended decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record of such portion thereof as may be cited by any party and as supported by and in accordnace with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Judicial Review

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion--

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other

writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Examiners

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases

in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witnesses fees as established for the United States courts.

Code of Federal Regulations—Title 42, Part 34

PART 34—MEDICAL EXAMINATION OF ALIENS

Sec.

34.1 Applicability.
34.2 Definitions.
34.3 Examinations; by whom made; female aliens.
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AUTHORITY: §§34.1 to 34.13, inclusive, issued under sec. 16, 39 Stat. 874, secs. 322 (c), 325, 58 Stat. 696, 697; 8 U. S. C. 152, 42 U. S. C., Sup. 249 (c), 252.

DERIVATION: §§34.1 to 34.13, inclusive, contained in Regulations, Surgeon General, Aug. 26, 1947; approved by Acting Federal Security Administrator, effective Sept. 30, 1947, 12 F. R. 5848.

§34.1 *Applicability.* The provisions of this part shall apply to (a) the medical examination and reexamination of aliens presented therefor to the Public Health Service upon the arrival of such aliens at a port of entry, or upon an application for a visa at a foreign consulate of the United States, and (b) the medical and other care, and burial, of aliens admitted to Public Health Service stations and hospitals at the request of the Immigration Service.

§34.2 *Definitions.* As used in this part, terms shall have the following meanings:

(a) *Immigration Service.* The Immigration and Naturalization Service of the Department of Justice.

(b) *Loathsome or dangerous contagious disease.* Any of the following diseases:

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1. Actinomycosis.
2. Amebiasis.
3. Blastomycosis.
4. Favus.
5. Filariasis.
6. Gonorrhea.
7. Granuloma inguinale.
8. Keratoconjunctivitis infections.
9. Leishmaniasis.
10. Leprosy.
11. Lymphogranuloma Venereum.
12. Mycetoma.
13. Paragonimiasis.
14. Ringworm of scalp.
15. Schistosomiasis.
16. Chancroid.
17. Syphilis, infectious stage.
18. Trachoma.
19. Trypanosomiasis.
20. Yaws.

(c) *Medical certificate.* A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

(d) *Medical notification.* A document issued by an examining medical officer to a consular authority, signed by the officer and notifying such authority of his findings with respect to an alien's physical and mental condition.

(e) *Medical officer.* A physician assigned or detailed by the Surgeon General of the Public Health Service to make mental and physical examinations of aliens.

(f) *Medical officer in charge.* A medical officer charged by the Surgeon General with responsibility for the conduct and supervision of all medical examinations made at a designated place or in a designated area.

§34.3 *Examinations: by whom made; female aliens.* Aliens presented to the Public Health Service for medical examination shall be examined by medical officers. Female aliens shall be examined only by female medical officers, or in the presence of a female, who may be an assistant to a medical officer.

§34.4 *Scope of examinations.* In performing examinations and re-examinations, medical officers shall give consideration to only those matters which relate to the physical or mental condition of the alien, and shall issue certificates or notifications of a disease or defect as hereinafter provided only if the presence of such disease or defect is clearly established.

§34.5 *Aliens free of disease or defect; notation on visa.* If an alien is found to have no physical or mental disease or defect, medical officers shall so indicate by notation on his visa.

§34.6 *Aliens afflicted with disease or defect.* If an alien is found to have one or more physical or mental diseases or defects, medical officers shall report their findings to the Immigration Service, by medical certificate, or to the presenting consular authority, by medical notification.

§34.7 *Certificates and notifications; Class A.* A Class A certificate or a Class A notification shall be issued with respect to any alien who is found to be afflicted with any of the following diseases or defects:

(a) Tuberculosis in any form;

(b) A loathsome or dangerous contagious disease;

(c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psychopathic inferiority;

(d) A mental defect not enumerated in paragraph (c) of this section; *Provided, however,* That a Class A certificate or Class A notification shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remediable physical causes, or from a psychosis of a temporary nature caused by a toxin, drug, or disease.

§34.8 *Certificates and notifications; Class B.* A class B certificate, or Class B notification, shall be issued with respect to an alien who has a physical defect which is of such a nature that it may affect his ability to earn a living. The certificate, or notification, shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

§34.9 *Certificates and notifications; Class C.* A Class C Certificate, or Class C notification, shall be issued with respect to an alien who has a disease or defect other than those for which a Class A or Class B certificate (or notification) is required to be issued.

§34.10 *Detention and observation; adequacy of facilities.* (a) Whether, upon an examination, it appears to the medical officer in charge that there is doubt about the physical or mental condition of an alien, the alien shall be held over for such observation and further examination as may be reasonably necessary to determine his physical or mental condition.

(b) When in the judgment of the medical officer in charge, a medical examination or re-examination cannot be satisfactorily completed at a station or place at which it is undertaken, such examination or re-examination shall be discontinued and such officer shall recommend to the presenting authority that the alien be removed to a place where the examination or re-examination may be satisfactorily completed.

§34.11 *Medical and other care; death.* (a) Upon request of the Immigration Service, an alien detained by it shall be admitted to a hospital or station of the Public Health Service and receive therein necessary medical, surgical, and dental care. An alien found, in the course of an examination or re-examination, to be in need of emergency care shall be given such care to the extent deemed practicable by the medical officer in charge, and if in need of further care, he shall be returned to the presenting authority with the medical officer's recommendations concerning such further care.

(b) In case of death of an alien the body shall be delivered to the presenting authority; but if such death occurs in the United States, or in a territory or possession thereof, public burial shall be provided upon request of the Immigration Service and subject to its agreement to pay the burial expenses. Autopsies shall not be performed unless approved by the Immigration Service.

§34.12 *Quarantinable diseases.* Any alien arriving at a port of the United States who, in the course of a medical examination, is found to be infected with a disease defined as quarantinable under Part 71 of this chapter (Foreign Quarantine Regulations of the Public Health Service) shall be held under observation, isolated and released in accordance with the applicable provisions of such regulations.

Appendix I.

§34.13 *Re-examination; convening of boards; expert witnesses; reports.* (a) The Surgeon General, or when authorized, a medical officer in charge, shall convene a board of medical officers to re-examine an alien.

(1) Upon the request of the Immigration Service for a re-examination by such a board, or

(2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

(b) Such a board shall consist of three, when practicable, but in no case less than two, medical officers. In the event that a board consists of three medical officers, the decision of the majority thereof shall prevail.

(c) Re-examination shall include:

(1) A medical examination by the board;

(2) A review of all records submitted;

(3) Use of any laboratory or diagnostic methods or test deemed advisable; and

(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

(d) An alien who is to be re-examined shall be notified of the time and place of his re-examination not less than five days prior thereto.

(e) An alien being re-examined may introduce as witnesses before the board such physicians or medical experts as the board may in its discretion permit, at his own cost and expense, *Provided*, That an alien who has appealed from a certificate of insanity or mental defect shall be permitted to introduce at least one expert medical witness. If witnesses offered are not permitted by the board to testify,

the record of the proceedings shall show the reason for the denial of permission.

(f) Witnesses before the board shall be given an adequate opportunity to examine medical certificates involved in the re-examination and to present all relevant and material evidence, orally or in writing, until such time as the proceedings are declared by the board to be closed.

(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

(i) If the board finds that an alien re-examined by it has a disease or defect not previously certified, it shall issue its certificate in accordance with the applicable provisions of this part.

(j) After submission of its report, the board shall not be reconvened in the same case except upon the express authorization of the Surgeon General.

APPENDIX II

COPY

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

—o—

Civil Action No. 1173-48

GERHART EISLER,

Plaintiff,

against

TOM CLARK, individually, and as Attorney General, and WATSON B. MILLER, individually, and as Commissioner of Immigration and Naturalization,

Defendants.

—o—

Civil Action No. 1174-48

IRVING POTASH,

Plaintiff,

against

TOM C. CLARK, etc., and WATSON B. MILLER, etc.,

Defendants.

—o—

Civil Action No. 1176-48

JOHN WILLIAMSON,

Plaintiff,

against

TOM C. CLARK, etc., and WATSON B. MILLER, etc.,

Defendants.

—o—

Appendix II

Civil Action No. 1177-48

CHARLES A. DOYLE,

Plaintiff,

against

TOM C. CLARK, etc., and WATSON B. MILLER, etc.

Defendants.

Preliminary Injunction

These causes came to be heard on motion of the plaintiffs for preliminary injunctions. With the consent of the parties the cases are consolidated for the purposes of the motions in view of the similiarity of the facts and issues involved. Having heard counsel for the parties, and having considered the pleadings, the affidavits submitted in support of the motion, the briefs and arguments of counsel, the Court makes the following

Findings of Fact

1. The plaintiffs have been arrested upon warrants of the Attorney General instituting proceedings for their deportation. They were taken into custody and held without bail by the defendants, but have been enlarged by the United States District Court for the Southern District of New York pending their appeals from orders of the Court denying their release on bail pending disposition of the deportation proceedings.

2. Deportation hearings have been initiated or scheduled for the plaintiffs before hearing officers of the Immigration and Naturalization Service. Under rulings of the

defendants, such hearings are not being, and will not be, conducted in accordance with the provisions of the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 237, 5 U. S. C., secs. 1001 et seq.), and particularly have been or will be heard by examiners not appointed, qualified, assigned or empowered pursuant to the provisions of said Act. The plaintiffs have requested that their deportation hearings be held in accordance with the provisions of said Act, and the defendants have denied their request.

3. The proceedings to deport the plaintiffs will be lengthy, cumbersome, and expensive, and will substantially curtail the plaintiffs' freedom of action.

Conclusions of Law

1. The Court has jurisdiction in the premises.

2. The hearings for deportation of the plaintiffs are governed by the provisions of the Administrative Procedure Act, and in particular by sections 5, 7, 8, and 11 thereof, relating to the conduct of agency hearings and the appointment, qualification, assignment and authority of hearing examiners.

3. The plaintiffs are threatened presently with irreparable harm by the refusal of the defendants to conduct the aforesaid deportation hearings in accordance with the requirements of said Act; they have no adequate remedy at law; and it is appropriate that equitable relief should be granted at this time.

Appendix II

Order

Wherefore, it is by the Court this 7th day of May, 1948,

ORDERED that the defendants, Tom C. Clark, Attorney General of the United States, and Watson B. Miller, Commissioner of Immigration and Naturalization, and each of them and their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be, and they hereby are, enjoined and restrained, pending final determination of these causes, from conducting or continuing to conduct hearings for the deportation of the plaintiffs or any of them which are not before hearing officers appointed, qualified, assigned and authorized in accordance with the provisions of the Administrative Procedure Act or which otherwise do not comply with the provisions of said Act, and from deporting or attempting to deport the plaintiffs or any of them on the basis of hearings or proceedings not held before such officers or which otherwise do not comply with the provisions of said Act, being Sections Nos. 5, 7, 8 and 11.

s/T. ALLAN GOLDSBOROUGH
Justice

No objection as to form.

s/JOHN P. BURKE
Assistant U. S. Attorney
Counsel for defendants.